

No. 97-1536

Supreme Court, U.S.
FILED
JUL 29 1998
AS THE CLERK

In The
Supreme Court of the United States
October Term, 1997

STATE OF ARIZONA ex rel.
Arizona Department of Revenue,

Petitioner,

v.

BLAZE CONSTRUCTION COMPANY, INC.,
Respondent.

On Writ Of Certiorari To The
Arizona Court Of Appeals, Division One

JOINT APPENDIX

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**Petition For Certiorari Filed March 16, 1998
Certiorari Granted May 18, 1998**

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59 pp

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The following opinions, decisions, judgments, and orders have been omitted in printing this joint appendix because they appear on the following pages in the appendix to the printed Petition for Certiorari:

Opinion of the Arizona Court of Appeals, Division One, filed April 29, 1997	App. 1
Order of the Arizona Supreme Court denying Petition for Review, dated December 19, 1997	App. 27
Judgment of the Arizona Tax Court, dated March 7, 1996	App. 28
Minute Entry of the Arizona Tax Court, dated November 28, 1995	App. 29

RELEVANT DOCKET ENTRIES**ARIZONA TAX COURT DOCKET ENTRIES**

02	COMPLAINT	SEP. 16, 1994
04	ANSWER	NOV. 16, 1994
06	PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT	AUG. 29, 1995
07	PLAINTIFF'S STATEMENT OF FACTS IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT	AUG. 29, 1995
	DEFENDANT'S STATEMENT OF FACTS IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT AND IN SUP- PORT OF CROSMOTION FOR SUMMARY JUDG- MENT ¹	OCT. 02, 1995
17	MEMORANDUM IN OPPOSI- TION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT	OCT. 12, 1995

¹ Included in court's docket, but not listed or numbered on Index sent to court of appeals. Copy attached to Appellant's Opening Brief at the Arizona Court of Appeals.

18	DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT	OCT. 12, 1995
21	PLAINTIFF'S RESPONSE TO CROSS-MOTION FOR SUMMARY JUDGMENT, AND REPLY TO OPPOSITION TO PLAINTIFF'S MOTION	OCT. 24, 1995
22	PLAINTIFF'S STATEMENT OF FACTS IN OPPOSITION TO CROSS-MOTION FOR SUMMARY JUDGMENT, AND OBJECTIONS TO DEFENDANT'S STATEMENT OF FACTS.	OCT. 24, 1995
23	PLAINTIFF'S SUPPLEMENT TO STATEMENT OF FACTS IN OPPOSITION TO CROSS-MOTION FOR SUMMARY JUDGMENT, AND OBJECTIONS TO DEFENDANT'S STATEMENT OF FACTS.	OCT. 31, 1995
24	REPLY IN SUPPORT OF BLAZE'S CROSS-MOTION FOR SUMMARY JUDGMENT	NOV. 01, 1995
28	JUDGMENT	MAR. 12, 1996
29	NOTICE OF APPEAL	APR. 04, 1996

ARIZONA COURT OF APPEALS, DIVISION ONE DOCKET ENTRIES	
07/22/96	APPELLANT'S OPENING BRIEF
09/16/96	ANSWERING BRIEF OF THE ARIZONA DEPARTMENT OF REVENUE
10/21/96	APPELLANT'S REPLY BRIEF
04/29/97	ORDER - OPINION - (REVERSED AND REMANDED) (Dept. T, Judge Ehrlich CONCURRING Judges Noyes, Gerber)
05/29/97	PETITION FOR REVIEW. (Appellee)

ARIZONA SUPREME COURT DOCKET ENTRIES

1 6/19/97 Petition for Review [Appellee State ex rel Arizona Department of Revenue] [COA Opinion filed 4/29/97]

2 6/19/97 Appendix to Petition for Review [Appellee State ex rel Arizona Department of Revenue]

4 7/03/97 Response to Petition for Review [Appellant Blaze Construction Co Inc]

5 7/03/97 Appendix to Response to Petition for Review [Appellant Blaze Construction Co Inc]

8 12/16/97 ORDERED: Petition for Review = DENIED.

8A 12/16/97 Justice Martone voted to grant the petition for review.

BEFORE THE STATE BOARD OF TAX APPEALS,

DIVISION TWO

STATE OF ARIZONA

1501 West Washington Street, Room 224

Phoenix, Arizona 85007

(602) 542-3288

BLAZE CONSTRUCTION)	
COMPANY, INC.,)	Docket No. 950-92-S
Appellant,)	NOTICE OF
vs.)	DECISION:
ARIZONA DEPARTMENT)	FINDINGS OF
OF REVENUE,)	FACT AND
Appellee.)	CONCLUSIONS OF
)	LAW

The State Board of Tax Appeals, Division Two, having considered all evidence and arguments presented, and having taken the matter under advisement, finds and concludes as follows:

FINDINGS OF FACT

Blaze Construction Company, Inc. ("Appellant") is an Indian-owned company located in Oregon and incorporated under the laws of the Blackfeet Tribe. Its sole owner is William Aubrey, a member of the Blackfeet Tribe. Appellant works exclusively on construction projects on Indian reservations located within several states, including Arizona.

The Arizona Department of Revenue ("Department") assessed transaction privilege tax on Appellant's gross receipts received between June 1, 1986 and August 31,

1990, pursuant to a number of contracts. Each of the contracts in issue was entered into between Appellant and the Bureau of Indian Affairs ("BIA").

Under the contracts in issue, Appellant either built Indian housing and residential streets around same, or built or rehabilitated roads improving access to local tribal government buildings, housing, farms, ranches and schools. Appellant does not own or maintain any offices, construction yards, or other facilities in Arizona other than those on Indian reservations. Appellant is not required by the BIA or any other reservation contracting agency to be licensed by Arizona and, in fact, Appellant is not licensed by the State.

After unsuccessfully appealing to the Department, Appellant now timely appeals to this Board.

DISCUSSION

The issue on appeal is whether a 100% Indian-owned contractor is liable for Arizona transaction privilege tax on its gross receipts for construction performed exclusively on Indian reservations pursuant to contracts with the BIA.

Appellant argues that it is not subject to state taxation on the activities in issue under Indian-preemption analysis. The Department counters that preemption analysis is unnecessary because in contracting with the BIA, Appellant contracted with the federal government, not an Indian Tribe, making Appellant liable for transaction privilege tax. *See United States v. New Mexico*, 455 U.S. 720

(1982) (contractors performing services for federal government subject to gross receipts tax). However, in a recent decision involving the same taxpayer and the same issue, the New Mexico Court of Appeals held that although certain construction was BIA-funded and administered pursuant to a contract between the BIA and the contractor instead of between a tribe and the contractor, application of preemption analysis to the issue of taxation was not precluded. *Blaze Const. Co. v. Taxation and Rev. Dep't of New Mexico*, 871 P.2d 1368 (N.M. Ct. Appellant, 1993).² The Board agrees. As noted in *Blaze*, the BIA may be a federal agency, but it is a federal agency with a special relationship with Indian Tribes. *Id.* at 1370; *see also, White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 145-48 (1980) (describing BIA involvement in tribal business enterprises). Therefore, Indian-preemption analysis is appropriate.

Appellant contends that Indian-preemption analysis requires tribal interests be considered and weighed against state and federal interests. *See Ramah Navajo School Bd. v. New Mexico*, 258 U.S. 832 (1982); *Bracker*, 448 U.S. at 146-48. The Department argues, however, that the Supreme Court recently abandoned this balancing-of-interests standard, looking instead to express or implied Congressional intent to preempt state tax. *See Cotton Petroleum Corp. v. New Mexico*, 109 S. Ct. 1698 (1989) (upholding the imposition of a state severance tax

² Under circumstances virtually identical to those now before this Board, the *Blaze* court held that New Mexico's gross receipts tax on *Blaze*'s road construction activity was preempted.

imposed on a non-Indian company engaged in oil and gas production on the reservation). However, a review of *Cotton Petroleum* confirms the relevance of the analyses set forth in *Ramah* and *Bracker*.

In *Cotton Petroleum*, the Court noted that “[e]ach case requires a particularized examination of the relevant state, federal, and tribal interests.” 109 S. Ct. at 1707 (citing *Ramah, supra*). In weighing these competing interests, the Court concluded that New Mexico’s severance tax on oil and gas leases was valid because:

1. The state provided substantial services to the Tribe and *Cotton Petroleum* that justified the tax;³
2. the tax imposed no economic burden on the tribe; and,
3. the federal and tribal regulation of the activity was not exclusive, since New Mexico regulated the spacing and mechanical integrity of the on-reservation wells.

Id. at 1701. In contrast, the lack of any state contribution to the tribal interests taxed in *Ramah* and *Bracker* made the impact on tribal interest substantial. *Id.* at 1711-1712.

Addressing the burden on the tribe, the *Cotton Petroleum* Court found that although the oil severance tax would impose a burden on the tribe by reducing the value of its leases, the burden did not substantially affect the marketability of the tribe’s oil. *Id.* at 1713. Therefore, the Court ruled that absent a “special factor” such as a

³ *Cotton Petroleum* conceded that New Mexico provided its operations with nearly \$90,000 between 1981 and 1985.

lack of regulatory interest or a lack of a justification to tax as found in the *Ramah* and *Bracker* decisions, the impact to the tribe’s well-being was “too indirect and too insubstantial” to support preemption. *Id.*

In this case, the State of Arizona has similarly failed to identify any valid interest it has in Appellant’s construction activities. The State neither provides services to Appellant’s operations nor regulates its activities. Conversely, the tribes in Arizona have an interest in the preemption of Arizona’s transaction privilege tax because the tax reduces the amount of funds available for roadway improvement and construction on reservations in Arizona, which in turn detrimentally impacts the welfare, safety, financial well-being, and sovereignty of tribes and tribal members.

Furthermore, the federal interest is evident. Pursuant to its authority under Title 25, the BIA has promulgated road construction regulations giving it complete authority over all aspects of contracting on reservations (*see, e.g.*, 48 C.F.R. Part 1 *et seq.* (Federal Acquisition Regulations)), as well as the selection of projects, the approval of location and design, and the construction, improvement, maintenance, use and policing of roadways. *See generally* 25 C.F.R. §§ 170.1-19 and Part 11.

CONCLUSIONS OF LAW

The Board concludes that the competing federal, state, and tribal interests at stake in this case compel preemption of Arizona’s transaction privilege tax. *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 109 S. Ct. 1698 (1989); *Ramah Navajo School Bd. v. New Mexico*, 258

U.S. 832 (1982); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980); *Blaze Const. Co. v. Taxation & Rev. Dep't of New Mexico*, 871 P.2d 1368 (N.M. Ct. App. 1993).

ORDER

THEREFORE, IT IS HEREBY ORDERED that the appeal is granted and the final order of the Department is vacated.

THIS DECISION BECOMES FINAL upon the expiration of thirty (30) days from receipt, unless either the State or the taxpayer brings an action in Superior Court as provided in A.R.S. § 42-124.

DATED this 18th day of July, 1994.

STATE BOARD OF TAX APPEALS

Stephen P. Linzer, Chairman
Division Two

BEFORE THE
ARIZONA STATE BOARD OF TAX APPEALS
DIVISION TWO
STATE OF ARIZONA
1501 West Washington Street
LEVEL 2 NORTH - SUITE 224
Phoenix, Arizona 85007

BLAZE CONSTRUCTION)	
COMPANY, INC.,)	
Appellant,)	
vs.)	Docket No. 950-92-S
ARIZONA DEPARTMENT)	
OF REVENUE,)	
Appellee.)	

Joint Statement of Stipulated and Contested Facts

Pursuant to Rule R-16-3-114 of the Arizona State Board of Tax Appeals, and the request thereunder by Division Two, appellant Blaze Construction Co. and appellee the Arizona Department of Revenue hereby file this joint statement of stipulated and contested facts in the above captioned matter.

I. Procedural History

On April 7, 1992, Blaze Construction Company, Inc. ("Blaze") filed an appeal to the Board of Tax Appeals, Division Two (the "Board") from an order dated March 6, 1992, issued by the Director of the Arizona Department of Revenue ("Arizona"). This order, affirming a decision dated September 27, 1991, by a Department Hearing Officer, denied Blaze's protest dated November 14, 1990, of a

sales tax deficiency assessment in the amount of \$1,200,581.54 ("Assessment"). In the Assessment, the Department of Revenue has levied its transaction privilege (sales) tax ("Sales Tax") against gross receipts received by Blaze pursuant to a number of contracts with the United States Bureau of Indian Affairs ("BIA") and tribal housing authorities (collectively, the "Contracts"). The Contracts were for road and housing project construction work located entirely on Indian reservations.

In its appeal, Blaze has requested that the Board reverse the decisions of the Department of Revenue and find that the Department is without authority to assess its Sales Tax against the gross receipts received by Blaze under the Contracts.

This document outlines the facts to which the parties stipulate, as well as the facts in contention. This stipulation is entered into for the purposes of this proceeding only, and may not be used for any other purpose. The parties reserve the right to supplement or amend this Joint Statement of Stipulated and Contested Facts as additional information becomes available.

II. Stipulated Facts

A. Posture of the Parties

1. Appellant Blaze Construction Company, Inc. is a 100% Indian-owned company incorporated under the laws of the Blackfeet Tribe. Blaze works exclusively on construction projects on Indian reservations located within several states, including Arizona.

2. Blaze's sole owner is William Aubrey, a member of the Blackfeet Tribe.
3. Blaze does not own or maintain any offices, construction yards, or other facilities in Arizona, other than on Indian reservations.
4. Blaze is not required by the BIA or any other reservation contracting agency to be licensed by Arizona, and in fact, Blaze is not licensed by the State.
5. Appellee Arizona Department of Revenues is seeking to collect its Sales Tax on gross receipts paid to Blaze between June 1, 1986, and August 31, 1990, pursuant to the Contracts which the State has identified in a series of spread sheets (attached as Exhibit A).

B. Overview of the Projects at Issue

6. For the projects at issue, Blaze either built Indian housing or residential streets around Indian housing or built or rehabilitated roads which improved access to local tribal government buildings or housing, farms, ranches, or schools.
7. Each of the Contracts was entered into between Blaze and either the BIA or a local housing authority.

C. Descriptions of Specific Projects

1. Project Located in New Mexico

8. The Paraje Street and Roads Project (Job No. 8630) was performed on the Laguna Indian Reservation in New Mexico.

2. Projects on the Navajo Indian Reservation

9. All of the projects within the Navajo Reservation were intended to improve access to Indian housing, local government "chapter" houses, and BIA schools. These roads are used predominately by Navajos but are open to the general public.

10. The Lower Greasewood Project (Job No. 90406; Contract No. CBN00001390) included the pavement of approximately 13 miles of BIA/Navajo Route 15 from BIA/Navajo Route 6 northeast to the Village of Lower Greasewood. The Project improved access to Lower Greasewood and a BIA school. The segment of BIA/Navajo Route 15 paved by the project is located at its closest approximately 25 miles by road from the Reservation border, in this case a point approximately 15 miles north of Holbrook, Arizona. The Project is located approximately 19 miles from Arizona Route 77, which leads from the Reservation border to Holbrook.

11. The Sanders Housing Project (Job No. 89405; Contract No. CBN00003689) provided residential streets around Indian housing built by the Hopi-Navajo Relocation Commission. The Project is located near Sanders, Arizona and is within a few miles of Interstate 40.

12. The Blue Gap Road Project (Job No. 89401; Contract No. CBN0000789) involved overlayment of approximately 7 miles of BIA/Navajo Route 29 (from BIA/Navajo Route 4 north to the Blue Gap Chapter House) and pavement of the Chapter House parking lot. The Project improved access to the Chapter House and scattered Indian housing. The road also serves as a school bus route. The Blue

Gap area is located in a sparsely populated area near the center of the Navajo Indian Reservation, which contains no buildings other than the Chapter House and Indian housing. The segment of BIA/Navajo Route 29 paved by the Project is located at its closest at least 105 miles by road from the Reservation border, in this case at Chambers, Arizona. The Project is located approximately 22 miles from U.S. Route 191.

13. The Cottonwood Road Project (Job No. 90413; Contract No. CBN000001690) involved pavement of approximately 8 miles of BIA/Navajo Route 25 (from BIA/Navajo Route 26 north to BIA/Navajo Route 251 near the Village of Salina). The Project improved access to scattered Indian housing and the Cottonwood Chapter House. The road also serves as a school bus route. The segment of Route 25 paved pursuant to the Project is located at its closest at least 80 miles by road from the Reservation border, in this case at Chambers, Arizona, and is located in a remote area near the center of the Navajo Indian Reservation. The Project is located approximately 15 miles from the U.S. Route 191.

14. The Inscription House Project (Job No. 8820; Contract No. N00 C 88C 0098) included pavement of BIA/Navajo Route 16 (from Inscription House to a point approximately 9 miles north) and pavement of the Chapter House parking lot. The Project provided improved access to the Inscription House Chapter House and a BIA school. The segment of BIA/Navajo Route 16 paved by the Project is located in a remote area of the Navajo Reservation at its closest at least 60 miles by road from the Reservation border, in this case at Page, Arizona. The

Project is located approximately 10 miles from Arizona Route 98.

15. The Low Mountain #1 Project (Job No. 8731; Contract No. N00 C 87C 0071) and Low Mountain #2 Project (Job No. 8812; N00 C 88C 0076) involved work on one roadway which was completed through two contracts. The first contract involved grading the Low Mountain Chapter House parking lot and approximately 13 miles of BIA/Navajo Routes 60, 65, and 67 leading to the Chapter House and a BIA school, and the second contract involved paving the same road and parking lot. The segment of roadway improved by this project is located in a remote area of the Navajo Reservation at least 50 miles by road from the Reservation border, in this case at a point on the Reservation border approximately 15 miles by road north of Holbrook, Arizona. The Project is located approximately 13 miles by dirt road from Arizona Route 264.

16. The Ganado and Cornfields Overlay Roads Project (Job No. 8849; Contract No. NOOC88C0116) involved overlayment of approximately 8 miles of BIA/Navajo Routes 15 and 15A and pavement of the Cornfields Chapter House parking lot. The Project improved access from the Village of Cornfields to Ganado High School and improved access to the Cornfields Chapter House. The Project is located at least 44 miles by road from the closest point on the Reservation border, in this case at Chambers, Arizona. The Project connects to Arizona Route 264.

17. The Holbrook Roads Project (Job No. 8740; N00C14204959) involved overlayment of BIA/Navajo Route 6 from its connection on the Reservation border to

Arizona Route 77 to a point approximately 8 miles North. This Project improved the route between the south-central area of the Reservation and Holbrook, Arizona, which is located approximately 15 miles by road south of the Reservation border.

18. The Red Valley Road Project (Job No. 90408; Contract No. CBN00002590) involved the pavement of BIA/Navajo Route 63 from the Village of Red Valley to a point approximately 5 miles north. The Project improved access to new Indian housing. The closest location within Arizona, not within the Navajo Reservation, from the Project is at least 120 miles south to the Reservation border at Chambers, Arizona, via BIA/Navajo Route 13 and U.S. Route 191, although a portion of BIA/Navajo Route 13 is unimproved dirt roadway through mountain passes and is impassable in bad weather. By this route, the Project is approximately 36 miles from U.S. Route 191. To reach the closest point in Arizona not within the Reservation on improved roads, the shortest route is at least 150 miles via U.S. Route 666 through Gallup, New Mexico, to Sanders, Arizona.

19. The Chinle Roads Project (Job No. 8024; Contract No. N00C88C0093) involved pavement of approximately 20 miles of BIA/Navajo Route 64 from the Village of Chinle to BIA/Navajo Route 12, and the pavement of approximately 15 miles of BIA/Navajo Route 12 from the Village of Lukachukai Southeast to Tsaile. The Project provided improved access to a number of villages and the Canyon de Chelly National Monument. The Project is located at its closest at least 70 miles by road from the Reservation border, in this case at Chambers, Arizona. The Project is located within five miles of U.S. Route 191.

3. Project on the Hopi Indian Reservation

20. The Hopi Roads Project (Job No. 8858; Contract No. H50C14209138) involved grading, drainage, and pavement of BIA/Hopi Routes 17, 503, and 508 and pavement of the parking lot at the Hopi Tribal Government Center on Second Mesa. The Project improved access to Hopi housing and the Tribal Government Center. The Project area is located at its closest at least 50 miles by road from the Reservation border, in this case at a point approximately 20 miles by road from Winslow, Arizona. Portions of the Project connect to or are near Arizona Route 264.

4. Project on the Fort Apache Reservation

21. The Fair Road Project (Job No. 8606; Contract No. H50C14206292) involved pavement of approximately 7.5 miles of BIA/Fort Apache Routes 1, 4, 5, 7, 45, 47, and 71 near the Village of Fort Apache. The area of the Project is located at least 20 miles from the Reservation border at a point near Pinetop-Lakeside, Arizona. The Project is located near Arizona Route 73.

5. Projects on the Colorado River Indian Reservation

22. The Parker Colorado River Roads Project (Job. No. 89403; Contract No. CBH50921889) and the Colorado River Roads Project (Job No. 90407; Contract No. CBH500189) involved pavement of local roads between irrigated fields located approximately 20 miles and 25 miles south, respectively, of the Reservation border north of Parker, Arizona. These roads were built to allow

farmers to move their equipment between irrigated fields. The Projects are located approximately 15 to 20 miles from Arizona Route 72.

23. Another Project on the Colorado Indian Reservation, also called the Colorado River Roads Project (Job No. 90410; Contract No. CBH50022590), involved the pavement and marking of approximately 9 miles of BIA/ Colorado Indian Reservation Route 1 and the installation of approximately 20 miles of mile post markers on the same road. The segment of roadway improved by the Projects starts approximately 5 miles north of the Reservation border at Ehrenberg, Arizona. The Project is located approximately 5 miles from Interstate 10.

6. Projects on the Papago Indian Reservation

24. The Sells Road Project (Job No. 8842; Contract No. H50C14207324) involved grading, drainage, and pavement of approximately 6 miles of BIA/Papago Route 34 five miles North of the Village of Sells. The Project improved access to scattered Indian Housing. The segment of road improved by the Project is located at its closest at least 30 miles by road from the Reservation border, in this case at a point approximately 30 miles by road west of Tucson, Arizona. The Project is located near Arizona Route 86.

25. The Papago #2 Project (Job No. 89404; Contract No. CBH50921589) involved pavement of approximately 7 miles of BIA/Papago Route 19 south of the Village of Sells. The Project improved access to scattered Indian housing. The segment of road improved by the Project is

located at its closest at least 25 miles by road from the Reservation border, in this case at a point approximately 30 miles by road west of Tucson, Arizona. The Project is located near Arizona Route 86.

26. The Papago Roads Project (Job No. 8717; Contract No. H50C14208293) involved the construction of two concrete bridges, the extension of culverts, the installation of guardrail and cattleguards, and the reconstruction of dip sections on BIA/Papago Route 19. The Project improved access to scattered Indian housing. The segment of road improved by the Project is located at its closest at least 25 miles by road from the Reservation border, in this case at a point approximately 30 miles by road west of Tucson, Arizona. The Project is located within 10 miles of Arizona Route 86.

7. Projects on the San Carlos Indian Reservation

27. The first San Carlos Roads Project (Job No. 90401; Contract No. CBH50013190) involved the grading, drainage, and pavement of approximately 7 miles of residential streets around Indian housing and the Tribal Government Center within the Village of San Carlos. The Project improved access to the housing and Government Center. The area of the Project at its closest at least 17 miles by road from the Reservation border at a point two miles by road east of Globe, Arizona. The Project is located near Arizona Route 170.

28. The second San Carlos Roads Project (Job No. 90412; Contract No. CBH500190) involved the pavement of approximately 17 miles of BIA/San Carlos Route 8,

located approximately 10 miles Northeast of the Village of San Carlos. The Project improved access to tribal cattle ranches. The Project is located at its closest at least 30 miles by road from the Reservation border at a point two miles by road east of Globe, Arizona. The Project is located approximately 10 miles from U.S. Route 70.

D. Nature of the Relationship Between Arizona and Blaze

29. On the projects under consideration, Blaze was not provided any specific services by Arizona, except Blaze's use of State roads to transport equipment from reservation to reservation.

30. Blaze paid fees relating to its use of the Arizona highways during the period of the Assessment, including purchase and maintenance of its Arizona motor vehicle license.

31. The State had no role in the planning, permitting, or other development of the projects, and otherwise had no authority over or role in the formation of the Contracts entered into between Blaze and the BIA.

32. Arizona provided no employment, construction, or quality or safety inspection services related to the projects.

33. Arizona provides no maintenance or regular police services related to any road at issue.

34. Approximately 85% of the persons employed by Blaze to complete the Projects were Indians.

35. All employment services related to the projects were provided by tribal employment referral services, and not by Arizona.

BEFORE THE
ARIZONA DEPARTMENT OF REVENUE
1600 West Monroe
Phoenix, Arizona 85007

In the Matter of:)
Blaze Construction Company, Inc.) Docket No.
) 910130-S
)

TRANSCRIPT OF HEARING
BEFORE DEPARTMENT OF
REVENUE HEARING OFFICER

JULY 23, 1991

Michael Worley, Hearing Officer, Presiding

For the Appellant: Daniel S. Press
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State of Arizona
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[Transcript, Page 1]

MW: Okay, we're on the record. Today is Tuesday, July 23rd, 1991. It's 8:30 a.m. This is the time set for the hearing in the protest of Blaze Construction Inc., our Case No. 910130-S in connection with the taxpayer's protest of an assessment of additional errors on the privilege tax, penalties, and interest for the audit period June 1986 through August 1990. My name is Michael Worley. I'm the hearing officer. For the record, I would like those present to state their names, starting on my left please.

PI: Patrick Irvine with the Attorney General's Office.

PW: Paul Wood, Blaze Construction Company

EW: Eddie Ward, Bureau of Indian Affairs, Contracting Officer

BA: Bill Aubrey, Blaze Construction

DP: Daniel Press, Attorney for Blaze Construction

MW: Okay, I'm going to assume that Mr. Aubrey, Wood and Ward are here as witnesses and I'll just swear them in now and save time later. So would you three gentlemen please raise your right hand? Do you swear in the testimony that you are about to give in this proceeding that you will

* * *

[Transcript, Page 11]

DP: Does Blaze have any offices, yards, or any other facilities in Arizona other than on Indian reservations?

BA: No.

DP: So your entire operation in Arizona is located on Indian reservations?

BA: Yes.

DP: In carrying out your BIA road project, do you receive any services from the State? Any police protection, inspection - ? Do you ever even see a state official on this project?

BA: No.

[Pause]

DP: On these projects, did your subcontractors and suppliers pay state sales and use tax?

BA: In many instances, they charged us the taxes.

DP: So that was added on to the cost of the subcontract?

BA: That's correct.

DP: So, they were not exempt, and you did not receive or apply for a certificate to exempt your subcontractors?

BA: It was my understanding at the time.

DP: Because you are not a licensed contractor in the State of Arizona.

BA: That's right.

* * *

[Transcript, Page 17]

DP: Okay. Fine. The next witness we'll call is Paul Wood.

DP: Please state your name, address, title.

PW: Paul Wood, 1000 Gabaldon, NW, Albuquerque, New Mexico 87104. General Manager of the Road Division of the Southwest with Blaze Construction Company.

DP: In that capacity, you oversee - manage all of Blaze's road construction projects in the State of Arizona?

PW: Yes, sir, that is correct.

DP: Do you visit every job?

PW: Yes, I do.

DP: In that capacity, have you ever received any state services in carrying out any of these road projects?

PW: No, sir.

DP: You've never seen a state official on the project to provide inspection services?

PW: That's correct. No state official at all.

DP: Police? If you have a problem on the job, and you need police services, what police -

PW: Well, Navajo we get a hold of - Navajo police handle it. In San Carlos, the San Carlos police handled it. Papago the Papago County, but no - no state agency at all.

* * *

[Transcript, Page 23]

PW: Yes we are.

DP: What is the procedure?

PW: Well, the trucks that we have over there we have to register them - we register them in Arizona and New Mexico. We pay a tax - just a regular road tax to the State of Arizona for the trucks to haul on it.

DP: When your trucks are hauling to the site, and you buy gasoline for them, are you required to pay the state gasoline tax?

PW: Yes, we are.

DP: What I would like to do now is go down the list of road projects that the State is assessing Blaze on, and have you describe a little bit about where those roads are located and who uses them. Start with the ones off Navajo and other reservations and move back to Navajo. It's about - as I can tell, it's about 50/50. Ah, San Carlos road project - describe where that is and who intends to use those roads.

PW: San Carlos, that's a street job there in San Carlos Reservation. Within the village of San Carlos. It's residential streets. And when you put in curb and gutter and pave it, the people that use it are the local people living there.

DP: San Carlos is a reservation town?

[Transcript, Page 24]

PW: That is correct.

DP: The majority of people there - or the vast majority are Indian?

PW: I'd say 100%. Whatever it is, I don't know.

DP: Is San Carlos also the tribal headquarters - the location of the tribal headquarters?

PW: That is correct.

DP: And these roads - streets around houses are also around the governmental buildings?

PW: That is correct.

DP: Both?

PW: Both.

DP: Okay. Parker - there are two Colorado River jobs, one is listed as Parker, Colorado and the other is

listed as Colorado River. My understanding that Parker, Colorado is within the Colorado River Reservation.

PW: Yeah. Both of them are about 15 miles south of Parker, Arizona. They're on the reservation there. And these roads were built for the farmers doing irrigation there - no main travel road, it's just between the fields. We have big alfalfa fields there, and they just went in and put new roads of gravel and paved it so that they could have a way to get the tractors up and down the road.

DP: This is into an irrigated farm?

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PW: That is correct.

DP: Do you know whose irrigation system that is?

PW: It's the tribe's.

DP: Funded through the Bureau of Indian Affairs?

PW: Yes, sir.

DP: So these roads provide access to BIA irrigation projects.

PW: That's correct.

DP: Sells - Sells, Arizona - which is on the Papago Reservation?

PW: Well, there's three jobs at Sells and that reservation. One of them was building a road into Ak Chin from a BIA road - no state roads in that area at all.

DP: Where did - did that road go to a particular location like the schools . . . ?

PW: It went to the Ak Chin school.

DP: Is that a state school or a BIA school?

PW: BIA school.

DP: And the second road -

PW: - second one started right there at Sells, and went straight south, almost 18 miles, and it was an extending of the concrete boxes. And that went out to scattered housing - Blaze had built some scattered houses down right through there. It was - it went all the way to the Mexican line - Mexican border. It was the last house that was built there - an Indian house.

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DP: You said Blaze built the houses. Who has funded those houses?

PW: HUD.

DP: Through the Tribal Housing Authority?

PW: Yes, sir.

DP: So the road provided access for the Indian houses -

PW: - correct -

DP: - funded by HUD through the Papago Indian Housing Authority. Okay and then there was the third project in Sells - Sells -

PW: - well, actually it was about 15 miles from Sells. It was an overlay - a job for a school route. It just went back in the - dead ended, in fact, there was about 100 houses back in through that area, and they just overlaid the road had been there 10-12 years.

DP: What kind of houses were those?

PW: Indian housing.
 DP: Had they been HUD funded Indian houses?
 PW: Yes.
 DP: So that road also was to provide access for Indians living in HUD Indian houses?
 PW: That is correct.

* * *

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DP: Summarized, you do new - you build new roads.
 EW: New roads. Overlay existing roads and chip seal existing roads.
 DP: Chip seal is kind of like filling in tracks and potholes?
 EW: Well, it's kind of just putting a very thin layer over potholes.
 DP: Where does the BIA get the funds to build the roads?
 EW: Federal Highway administration.
 DP: Prior to 1983, where did you get the money?
 EW: It came directly down from the Bureau -
 DP: - from Congress to the Bureau -
 EW: - yes.
 DP: Okay. Did anything else change in the way you designed and built roads before and after the money came directly to the Bureau from Congress as after it came from - through the Federal Highway Administration?

EW: Nothing changed. No.
 DP: What role does the Federal Highway play in the road projects?
 EW: Ah, we use the Federal Highway specifications and, in the State of Arizona - in Phoenix - Federal Highway Administration approves our specifications and our projects before we put them up for bid.
 DP: Did they do this in the old days before '83 as well?

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 EW: Same thing.
 DP: Okay.
 EW: In the State of New Mexico, in Santa Fe, they - we get approval from them before.
 DP: After they approve your specs, do they show up on the job? Do they do an inspection?
 EW: No. Once in a while they'll come out maybe for a final inspection, but very seldom. And I make most of the finals myself, or accept them with my engineers. I haven't been with a Federal Highway Inspector in a long time.
 DP: So you - BIA awards the contracts -
 EW: - and we close them out and accept them.
 DP: And who inspects them?
 EW: Our own people. We have our engineers that go out, and I'm an engineer myself.
 DP: They are out on the job on a regular basis?
 EW: Yes.

DP: Doing inspections -

EW: - yes, we have -

DP: - and testing -

EW: - five agencies in the Navajo, and we have a roads office at each agency. And they inspect - supervise as part of

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the inspection. Oversee Blaze under the agency that they have jurisdiction in.

DP: What's your annual budget for road construction?

EW: Approximately \$20 million.

DP: Is that sufficient to meet all of the road and design?

EW: No.

DP: Do you ever return any money at the end of the year because there's no need for the money?

EW: No, as a matter of fact, we have been fortunate to get more.

DP: Because the need is so great on it?

EW: Well, the - it's the - the need is there, but the procedure is that if the other area offices, which we have 12 of, on June 30th if they do not have a commitment for a contract - either it's advertised out in the street or getting ready to go - they have to return the money, and then they make a distribution on a first-asked basis. The Navajos have been very fortunate in the last two, three, four years to - to get extra money that's left over for road construction.

DP: So, if the State imposes a 5% tax on the contractor, there's no other pot of money that you can turn to pay for that budget cut - it leaves 5% fewer roads?

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EW: Yes, because in our specifications, we award - the contractor is required to include all local, state, federal taxes in the bid. So we don't know where he puts it, but on a \$20 million - I'm just using mathematics here - if we get a \$20 million budget, and they enforce 5 million - 5%, that would be \$1 million, certainly we're not going to get - we'll get less roads than we would have with the full \$20 million.

DP: Does the BIA take the position on whether the State has the authority to tax?

EW: No.

DP: Does the BIA require the contractor to have an Arizona license?

EW: No.

DP: When you have a project ready to go, do you develop an engineer's estimate of -

EW: - yes.

DP: What happens if the bid comes in below that estimate? What happens to the money -

EW: - it remains in the Navajo area budget to be used for - if we have \$100,000 left on the bid, we can - we have numerous bids throughout the year. The money that is saved, we can build another road or a bridge or whatever. Use it for force account. On Navajo it's very unique. We have our

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own force account crew which does a lot of grade and drain, and we employ 100% Navajo. It's government employed. And they do a lot of work, so if there's any money left there, we could get them to build a grade and drain project or a bridge.

DP: When you say "government", that's the BIA?

EW: Yes. We refer to it as the force account crew.

DP: These are government employees?

EW: Yes. Rather large - say - 150 to 200 employees. But the money stays back to - to answer your question - the money stays there until June 30th. If we have not spent, or obligated - it goes back just like under the Phoenix area. We all play by the same rules.

MW: Did you say "force" like f-o-r-c-e?

EW: Yes. Force account.

MW: How does the word "force" fit in there?

EW: I really don't know.

MW: Okay.

DP: It comes from the -

EW: - is it an acronym?

DP: No, it comes from the term "to do with your own forces".

EW: Oh, okay.

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DP: It got shortened from that. It's a legal term - actually, it's a governmental term. When the government does work with its own forces, as against contracted.

MW: Okay, thank you.

DP: What are the existing roads like on the Navajo reservation? Good shape, bad shape?

EW: Well, there are some that are good, but they've - we've been so limited on the funds. And Navajo is the largest Navajo - or area office in the United States, and we just don't get enough money to - either to maintain them or upgrade them. They are in bad shape.

DP: You've driven around the reservation?

EW: Oh, yes. I've been all over that reservation.

DP: And those road are . . .

EW: Probably the same situation in most states. Not enough money to go around.

DP: How does the BIA decide what road to build in the Navajo - I gather there is an enormous need for both roads and road improvements.

EW: Okay, the tribe has a roads committee which sets the priorities. A lot of it has to do with politics, as I mentioned there's - they set up the priorities on a need out there for those roads. Both - they go to the area's chapter houses, school bus routes, probably, some schools

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don't have a paved road going to the schools, so they may make that decision to put it on a priority. And they furnish that priority to the Branch of Roads, and then they make the decision as to the money - whether it's just going to be a grade and drain project from the outset or a grade and drain and paved, but that decision is made in the Branch of Roads.

DP: So the tribe sets the priorities -

EW: - yes -

DP: - and the BIA implements the existing projects.

EW: Yes.

DP: You indicated before, there's never enough money to meet all of the priorities set by the tribes.

EW: Right.

DP: Does the tribe contribute to the road projects in forms of right-of-way or other valuable -

EW: Yes, they grant the Bureau of Indian Affairs a right of way to construct the project. We cannot do it without their giving us the right of way.

DP: And that's tribal land.

EW: Yes.

DP: Do you - you have to compensate them for the?

EW: No.

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DP: If this was privately owned land, would you have to compensate them?

EW: I am sure they would ask for something for - to give us the right of way.

DP: So the tribe is making a valuable contribution -

EW: - yes -

DP: - cost of the road. I'd like to quickly go over the same issue I went over with Paul Wood which is describe the roads. We'll want just to hear from your perspective. You've worked 30 years out at the Navajo - 25 years at the Navajo. Where the

roads go and why they were built and . . . start with the Holbrook Road. Where does that road . . . ?

EW: That road runs north and south from - like Paul mentioned - from the reservation line north, up to - I believe it's Keams Canyon - all the way across there. And there's various trading posts, schools, in that area. And the road project that they worked on was an overlay project of an existing road.

DP: Is that a state road or a BIA road?

EW: BIA.

DP: How about up to the reservation boundary?

EW: I believe that's state.

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DP: And then the state responsibility ends right at the boundary?

EW: Yes.

DP: So the state overlays and does everything else right out to the reservation boundary and then -

EW: - yes -

DP: - they have no more responsibility?

EW: No.

DP: Okay. The Sanders Housing Project . . . ?

EW: That particular contract was to build paved streets, put in curb and gutter for the relocation people that were relocated by the Relocation Commission.

DP: Would you provide a little background on what the Relocation Commission is and why these people were relocated?

EW: To - just from my knowledge, they relocated them from under that Navajo-Hopi dispute, and they put them in an area there south of Sanders and the Relocation Commission contracted - we handled some of those housing contracts for the people that were moved there. And then we put out a bid for paving of the streets.

DP: So, all of the occupants of the houses were -

EW: - relocatees. Navajos -

DP: - Navajo relocatees.

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EW: Yes.

DP: And where did the money come from? Did it come from BIA appropriations?

EW: I believe that the money for that - for that particular project - was a special appropriation for the Navajo-Hopi contract. We got the bids for that project.

DP: To your knowledge, in my experience, the State does not provide any assistance or anything on the list that you went over with Paul. We maintain them. You mentioned snow removal. We also do that on a yearly basis. As Paul mentioned, if the - if he's working in an area on a contract like, say, the Red Valley one, we contract with them because they have some equipment out there to remove snow. And we pay them for it. But other than that, the Bureau will do it, but the Bureau is very limited on equipment, and it's very beneficial for contractors to cut - who got a grader out there to do it - we just pay them back. The State doesn't main - do any snow removal or any maintenance on - on the reservation.

DP: While we are on the subject, there are some state roads on the reservation?

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EW: Yes, yes. There are some main arteries, like from Shiprock all the way to Tuba City. I believe the road from Window Rock all the way to Tuba City is a state road. Yes, there are some.

DP: In the 25 years you have been on the reservation, are you aware of any roads - new roads that the BIA has built?

EW: New roads?

DP: New roads.

EW: Yeah -

DP: - not the BIA, the State has built, excuse me.

EW: No, no.

DP: In other words -

EW: - no -

DP: - the State hasn't built a foot of new -

EW: - no.

DP: Now they - you said they do have some roads that you maintain took over. Can - can - after you build a road - BIA builds a road - can you turn it over to the State for maintenance?

EW: Yes.

DP: And after that, they are responsible for -

EW: - right. To maintain it.

DP: Does that include doing overlay?

EW: Whatever it takes to keep it in good -

* * *

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DP: Okay. To your knowledge, has the State assumed maintenance of that road?

EW: No.

DP: It's still a BIA road?

EW: Uh huh.

DP: All right. Inscription House . . . ?

EW: That's a - that's a rather large area going to the Navajo Mountain School. Pretty rough terrain, so we've let out, I believe, two or three contracts leading up to the school. We were maybe half way there.

DP: What kind of school is that? A state school or BIA school?

EW: BIA school. Small, small school.

DP: Has the - that was a new road?

EW: Yeah.

DP: Has the State agreed to assume maintenance responsibility.

EW: No. That's - that's still in our Indian contracting department.

DP: And is that a main artery going across the state?

EW: No. No, that just goes to a very isolated area. Matter of fact, I used to know the principal there - it was so bad that when she went on leave at Christmas, I think they went in with a helicopter and got her out because of the snow and terrain.

So they finally - finally put that on a priority to get it - get it paved up in there.

* * *

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DP: So, to summarize, all of these roads are remote roads that effectively dead end at BIA school or the Navajo chapter house.

EW: Uh-huh, dead end, or most - some of the roads are existing roads for use of the local public there from one route to another.

DP: In the times you go out there, do you see many non-Indians?

EW: No. Not in these particular routes.

DP: Are these some of the most remote areas on the map?

EW: Yes. The Low Mountain, Cottonwood, Blue Gap, those areas are right in the center of the reservation. Very remote.

DP: Are there places out there where there is not even electricity?

EW: Yes. I'd say one - a lot of the Navajos out there don't have electricity in some of the areas like Navajo Mountain. I believe the school up there - the last time I was there they had a generator.

DP: Why is there a BIA school there?

EW: I don't know. I don't know. It's an old - matter of fact, I think that the buildings there are adobe. Kind of a round Navajo style adobes, from what I recall at the Navajo school.

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DP: Do you know where the nearest public school is?
From Navajo Mountain?

EW: From Navajo?

DP: Navajo Mountain.

EW: I would say at - well, I'd say that the closest would be Tuba City.

DP: Or Cianta or Page?

EW: Or Page.

DP: How far is this to the nearest school?

EW: Oh, it's quite a ways.

DP: 100? 70?

EW: I'd say a good 70 to 100 miles from - from the Navajo Mountain school to Tuba City which is the agency headquarters. Or they have a high school - the school there on Navajo Mountain is just a small-small school.

DP: And, to summarize, you said that the State has not taken over maintenance of any of the roads that BIA - that Blaze has built?

EW: Not to my knowledge, no.

DP: Okay. And the roads that are overlays and chip and seals are all roads that the BIA is responsible for maintaining -

EW: - we're still maintaining those, yes.

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DP: What services does the State provide the BIA under contract [inaudible], you've mentioned it before.

EW: None, to my knowledge.

DP: Could you explain the Buy Indian Act? How it works and how you use it on road construction?

EW: The Buy Indian Act was a law passed where the Bureau is required, when they procure for any services, supplies, or anything that they need, that they have to set it out under Indian preference, where only Indian contractors are allowed to compete or bid.

DP: Okay. Do you put out all of your road contracts out under . . . ?

EW: Yes, every one.

DP: Okay, and every one that Blaze has won, they won under a -

EW: - under a competitive seal bid procedure.

DP: That means that only Indians are allowed to bid, but the bid goes to the lowest -

EW: - responsive Indian bid -

DP: - responsive Indian bid -

EW: - yes.

DP: When the project is on a particular reservation like Navajo, do you give special preference to a Navajo contractor?

EW: No. No.

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DP: It's all - the Bureau doesn't distinguish between Navajo, for example, Blaze is a Blackfeet.

EW: No. It's a Indian contractor or Indian individual residing on or living near a reservation. They can

come from anywhere. But he has to be an Indian-owned firm.

DP: Speaking hypothetically, but this might actually have happened, what if the President of the Navajo Nation, Peterson Zah, came to me and said: "I want you to give a special preference to Navajo contractors over other Indian contractors when you put these projects out to bid."

EW: I couldn't do that.

DP: Has the tribe ever requested . . . ?

EW: No. They've tried to enforce Navajo preference in hiring. And the same stipulation applies in there, that if the contractor and the subcontractors were required to hire Indian people living on or residing near the reservation, and they have tried to get me to impose the Navajo preference which is recognized on the Navajo Reservation, but I inform the contractors, if they wish to do so, that's up to them, but legally, I cannot do that - distinguish between a Hopi or a Navajo as far as preference.

DP: And that's the BIA policy =

EW: Yes.

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DP: If a Navajo contractor were not subject to state tax, and therefore had 5% while an Indian from another reservation were subject to state tax, especially if it was a 5% - the Navajo had a 5% fewer cost than the Indian from the other reservation, how would that affect the bid?

EW: Well, I - I can assume that they would have an advantage. Being that they didn't have to pay that 5%.

DP: So, it would effectively create a Navajo preference of some sort - a 5% bid preference for the Navajos over the other Indians.

EW: I would say so.

DP: And if Peterson Zah, the Navajo Tribal President, asked you to create a 5% differential for Navajo contractors, your answer would be . . .

EW: Well, when you say "create a 5% -"

DP: - it's saying that you can allow Navajos and non - and the other Indians to bid, but the Navajo's bid is within 5% - within 5% of the non-Navajo bid. To give a bonus, effectively, to Navajos. This bid is within 5% of the -

EW: - no, no, I couldn't do that. Like I say, it's a seal bid. That decision would have to be a contractor's decision whether you would include it in his bid or not, I don't get involved in that.

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DP: So you couldn't include either - you couldn't even give an absolute preference to Navajos or a dollar preference -

EW: - no -

DP: - to Navajos.

EW: No.

DP: Let's talk about another law: the Self-determination Act. Could you explain how that Act works in regard to road construction?

EW: Well, that's another law that was passed by Congress that if the - any tribe wants a service or program that the Bureau of Indian Affairs is handling, for example road construction, they can request that service to be turned over to them.

DP: Can they do that for road construction? For example, the tribe says: we want to handle the road projects by - we want to let the bids, rather than the Bureau letting the bids.

EW: You can do that, yes.

DP: So, tomorrow the tribe could assume responsibility for awarding all of the road construction projects.

EW: That's right.

DP: If they did that, what would be different from the way it is now? Would the specs be different?

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EW: Not the specs, no I think they would still have to follow the Federal Highway Administra - Highway Administration standards for roads and bridges because of the safety factors that Federal Highway follows in designing.

DP: And the Bureau would still be involved in -

EW: - yes, in any program that the tribe takes over, the Bureau still oversees it from a certain standing point.

DP: Whose roads would they be at the time the project was completed?

EW: They'd still be BIA roads [inaudible]. Under the 638 process, the tribes are slowly - that's the intent, Indian self-determination, they are slowly taking over some small programs on the reservation, but the Bureau is still - is kind of oversees them.

DP: So effectively, then, there are two options for road construction. You can let the contract - you being the BIA - or the tribe can let the contract. For all

significant differences, there is no difference in how the road gets built, who owns the road -

EW: - no -

DP: - what the specifications are. It's just who - whose name is on the contract.

EW: Yes.

DP: And all the tribe has to do is make a request to -

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DP: Do you also put the phone number of the state tax commission?

EW: No.

DP: I have no more questions, Mr. Ward.

MW: Mr. Irvine . . .

PI: Mr. Ward, you said the BIA takes no position on state authority to impose this tax. Is that correct?

EW: Could you rephrase that question?

PI: The BIA has no official position as to whether the State can tax the contractor doing business with the BIA -

EW: - no -

PI: - on the reservation?

EW: No, we don't get involved in that.

PI: The BIA has never issued a ruling or instruction saying no state tax -

EW: - no -

PI: - on these kinds of contracts -

EW: - no. We don't have that authority.

PI: Okay. And, to your knowledge, Congress has never passed a law saying this kind of tax can't apply. I gave you a lot of leeway.

DP: Yeah. Okay.

* * *

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PI: To summarize it, if Blaze had to pay this tax, there is no provision for them automatically to be reimbursed by the government?

EW: No. No, I wouldn't make that decision unless there was enough documentation from a higher level authority - my solicitor - to, to say in fact - the general accounting officer or whatever - that oversees our, you know, the government agencies to allow that.

PI: You'd said the BIA gets some money from the Federal Highway Administration. Does the BIA get a lump sum?

EW: No. We used to. We used to years ago get \$18 million and then we would spend it. But now we go through a procedure where - right now I got two projects advertised, and we go through the central office in Albuquerque and then up to the Federal Highway Administration in Washington, D.C. And we are in total daily contact with what we have going on as far as the money. We - when we have the bid opening, we immediately get on the phone, give them the amount, and the paperback process starts, but I do not award a project until we have what we call a - there's a word that they use - when actually we have the authority to spend that money for that particular - comes

down to the - to our finance office. It's what they call allotment authority.

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PI: So does the Federal Highway Administration give you a project-by-project spending authority?

EW: Yes, yes.

PI: Does the Navajo Area Office deal directly with the Federal Highway Administration . . . as far as funding?

EW: I believe they do, through the central office in Albuquerque, yes. The Federal Highway Administration and our roads department work very closely on these projects because we are talking about a lot of money.

PI: So, well, let's go through the process, then. You decide you need a road in a particular spot . . .

EW: Right.

PI: What do you do as far as contacting the - as - yeah, go - just go through the procedure.

EW: Okay. I get a - the specification package from the Branch of Roads. We have our own design section. I put the boiler plate together, advertise it in the Commerce Business Daily for 45 days, set the bid opening date, put the complete package together. I conduct the bid openings, and we prepare what we call an "abstract of bids." It's a public opening. I take the abstract of bids over to the Branch of Roads. They get on the phone with the central office and give them the amount of the bid -

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PI: - central off - excuse me, central -

EW: - Albuquerque.

PI: And that's of the Federal Highway Administration?

EW: No.

PI: That's the BIA - ?

EW: - BIA.

PI: Okay.

EW: In Albuquerque. And they - from there they take care of contacting the Washington office for the money to - to come down.

PI: The Washington office of the BIA?

EW: Yes. I'm not too - I don't talk to them people up there. I don't have any need to, so I really don't know who is talking to who. But our roads office calls the Albuquerque office, and then they take it from there. And they hold - they, they - what I send is a concurrence memo and the award to Blaze, or whoever was the low bidder. They do not reply until the money has been received by them. The money does not come to me. I just award the contract. Once they get the money, they're the responsible program office, then they come back, proceed in the award to the low bidder.

PI: Now, who are you talking about here? Who - who are you saying gets the money?

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EW: The roads program office. See, in the Bureau there's different programs. Education, roads, just numerous - and they're - they get their own allotment authority from - from Washington.

PI: Where are they located? The roads program office?

EW: In - right down the hall from where I'm at. In Gallup.

PI: Okay. So the - so the money doesn't go through your hands, it goes through -

EW: - no -

PI: - somebody else in Gallup -

EW: - right, it goes - all money that - all we are is just a administrative office. The programs handle their own money. They are responsible to be sure that they take care of what they get. But it's done on a "per project" basis. In other words, for example, if I got eight projects out on the street advertised, the Albuquerque office knows which ones they are.

PI: Uh-huh.

EW: In other words, those wheels have already started moving in the direction that, when we had the bid opening, there is not much time involved in - in getting the money down to our - to our roads section.

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PI: Who has allocated the money for the projects? You had mentioned - you set a - some parameters on what you think is a reasonable bid.

EW: No, the Branch of Roads comes up with what they call a "government design" estimate. A government estimate.

PI: And what is that?

EW: That's just the . . . the government's independent estimate of what that project should cost. That's derived from - they go back and make an analysis of the - what the projects are running. Cost of oil,

gas, isolation factor, wage rates. It's an independent estimate made up by them, taking all of these factors into consideration.

PI: You aren't involved in it?

EW: No, that is in a - that's in a sealed envelope that I receive the day of the bid opening, and I read that last. I read all the bids first and then I read the government's estimate. But at no time do I ever - I don't want to see it. What it is is just a sealed government envelope.

PI: What use do you make of it after you read it?

EW: We make a comparison. Because in a construction project, we have anywhere from 10 to 50 bid items. Different sizes of pipe, aggregate, dirt, and we - we come up with our own price per unit, and we compare it to what the contractors bid. They - they bid it the same way as we set it up,

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which is called a "bid schedule". For different phases of work. Guardrail, painting. . . .

PI: Are you given an annual amount that you are expected to - or that you are able to - to set up for construction?

EW: The Branch of Roads is given some kind of an estimate as to what the - what they get yearly. It's been running about \$18 million the last two or three years.

PI: Are you in the Branch of Roads?

EW: No.

PI: So they're given an estimate? It's not just a budget that they're free to spend?

EW: Well, it's - it's pretty close in that, when you are talking \$18 million, that's pretty well what they tell them they're going to get for the year, and they prepare their program based on - around that \$18 million.

PI: You'd talked about if - there are 12 areas. Is that 12 areas of the BIA?

EW: Yes.

PI: That if the money is not spent or committed by the end of the fiscal year, it can be reallocated to other areas?

EW: Yes.

PI: And the Navajo area has gotten such reallocations in the past?

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EW: Yes. Navajo is the largest of the - of the area offices, other than Juneau in Alaska. But that's area-wide up there but as far as being with the public, Navajo is the largest. We get more than anybody.

PI: In absolute dollars or amounts that other areas don't spend?

EW: I would - I would - well, no, dollars. Our percentage of the budget that it comes out of Federal Highway, Navajo gets the largest percentage. They use a formula up there. I don't know how they come up with it, but it's - it's - Navajo is the largest.

PI: Okay. Going back to what you just said about money coming from the Federal Highway, in order to reach Navajo area, how does that money flow? Let's say it starts Point A, Federal Highways, then

down here is the Navajo area. Where does it flow? Does it get - go to Washington first and then come down?

EW: I - I don't know.

PI: Don't know?

EW: No. Because I'm not involved in that aspect of it.

PI: In order for the Navajo area to get these amounts that haven't been spent by other areas, that means the other areas didn't spend their amounts -

EW: - yes -

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PI: - is that true?

EW: Yes. Like I say, there's a daily communication, especially down towards the end of the year, and June 30th, which is the deadline set by the higher-ups to either have a project ready for obligation for award, or advertised out in the street. There's quite a huge - lot of people involved in keeping track of what area has spent or what they have, especially down to the wire. And some don't spend it. They just don't have the project designed.

PI: Do you know if the Navajos have ever gotten some money from the Phoenix area?

EW: I heard that we had, but I don't get involved in that aspect of it either.

PI: So you just aren't as involved in the financing -

EW: - no -

PI: - part of it -

EW: - I'm not involved in the financing at all.

PI: You're involved in the real work -

EW: - administration, yeah. The problems.

PI: The real work. How many - how big is your - your own forces? I guess using force work. How many employees do you have in your department - that work for you on roads?

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EW: Oh, we have five agencies under Navajo, including irrigation projects. I couldn't tell you. It's-it's large.

DP: Can I - you're asking how many people are out building roads or how many people work for him through the contract administration?

PI: Who work for the BIA - doing - as actual employees doing road work.

DP: You mean the force account, you're talking about - who are out there with shovels and -

PI: - actual employees of -

EW: - let me, let me -

PI: - the BIA -

EW: - let me explain that. We have five agencies, and each agency has a road office. Okay. They have inspectors, they have engineers out there, and what they do is they monitor the contracts that Blaze does to - or to make sure that they're complying with a particular specification, building it according to what they bid for.

PI: Does the BIA ever do any - any road construction with its own employees?

EW: Yes. That force account crew that I mentioned, yes.

PI: Do you have any idea as – the percentage of the annual budget, how much –

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EW: – I have no idea –

PI: – of it's spent on direct and how much is contracting?

EW: I don't know.

PI: In talking about when the State takes over road maintenance. Do you have knowledge of that happening? Has that happened in your 25 years there?

EW: Yes, and I want to reiterate: that is not a department that I am involved in, but I've heard mention that this particular road was turned over to the State for their – for their control, to be put on their inventory. And I assume that when that is done, they maintain it. But very few, to my knowledge, have been turned over to the State.

PI: Does – does the BIA ask that the State take over very many?

EW: Not to my knowledge. I inquired about that, and I found out that the State can ask, or the tribe can ask, or the BIA can ask the State to take one over, and they can deny it – or deny their request. But, in my experience, there are very few that I believe have been turned over to the State.

PI: How many – since you aren't involved in this you may not know, so say so – do you know what the procedure is for transferring it to the State?

EW: I think there is an agreement that is reached between the State and the tribal and the BIA.

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DP: But that's an option available to the –

EW: – to the Bureau, yes –

DP: – Bureau. I assume with tribal consultation?

EW: No. That – that's strictly a Bureau function.

DP: Just to clarify an issue: you talked about the lump sum payments. Mr. Irvine asked if you have a lump sum. Does the BIA have a lump sum amount it gets either as designated – appropriated by Congress through the Federal Highway Administration for BIA roads?

EW: To my knowledge, Congress appropriates a lump sum for Interior. Then it's divided up for the different programs. But we do not get it – I know for a fact – as a lump sum, during the year. We have to ask for it on a project-by-project basis.

DP: If you use a – let's say it's \$75-\$80 million for the BIA, and the BIA has spent all that \$80 million, can you go to Federal Highway and say "give us some of your money so that we can spend another \$20 million for road construction projects."?

EW: I guess we could, but I don't know if they'd give it to us or if they had it. I don't know.